BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Monica Fiorini dated November 15, 1991, alleging discrimination in employment on the basis of sex.

B E T W E E N:

Ontario Human Rights Commission

- and -

Monica Fiorini

Complainant

- and -

Di Poce Management Limited
John Di Poce
Karen Stewart

Respondents

INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : February 4, 1997

Board File No: BI-0097-96

Decision No : 97-003-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Cathryn Pike, Counsel
Monica Fiorini	)	Paul Wise, Counsel
Di Poce Management Ltd., Corporate Respondent	)	Peter Israel, Counsel Christopher Andree, Counsel
John Di Poce, Personal Respondent	)	Peter Israel, Counsel Christopher Andree, Counsel
Karen Stewart, Personal Respondent	)	Peter Israel, Counsel Christopher Andree, Counsel

THE ISSUES

This interim decision deals with a request by the Respondents for a stay of the proceedings before the Board of Inquiry pending the outcome of the judicial review application brought in respect of an interim decision in this matter dated November 1996 and made by a different panel of the Board of Inquiry. The Ontario Human Rights Commission and the Complainant consented to the granting of the stay.

This interim decision also deals with a request by the Respondents and the Complainant for the adjournment of several hearing days. This request was not opposed by the Commission.

THE DECISIONS

At the hearing on January 30, 1997, I rendered an oral decision refusing to grant a stay.

At the hearing on January 30, 1997, I rendered an oral decision adjourning some, but not all, of the days for which adjournments had been requested.

THE FACTS

This complaint was referred to the Board of Inquiry and assigned by the Chair to Mary Woo Sims for adjudication. She commenced the hearing by way of conference call on June 20, 1996 and convened a day of hearing to deal with preliminary matters. Those preliminary matters were disposed of by her in a written interim decision dated November 7, 1996 ("the Sims Decision"). One of the matters decided by the Sims Decision related to whether the Board of Inquiry was obliged, as the Respondents asserted, to maintain a verbatim record of the proceedings before it.

The Sims Decision held that the Board was not obliged to do so as the section of the *Code* which had formerly required Board of Inquiry proceedings to be transcribed had been repealed. Although some of the Board of Inquiry's Toronto hearing rooms are equipped with audio recording devices, the Sims Decision refused the Respondent's request that she activate the recording equipment. The basis for this refusal to exercise discretion to make an audio recording, set out more fully in the Sims

Decision itself, was twofold: the Tribunals' Office policy dictated that such recordings were to be made only for the purposes of accommodating the needs of any counsel, advisors, parties or adjudicators in a hearing who suffer from a disability, and no one in this hearing fell within that category; and no party raised any other compelling reasons for making a recording. Her refusal to turn on the tape recorder is the decision that the Respondents seek to have quashed on judicial review.

Subsequent to the filing of the Application for Judicial Review, two things occurred: (1) the Respondents wrote to the Tribunals' Office requesting a stay of the proceedings; and (2) Ms. Sims resigned from the Board of Inquiry.

By facsimile transmission, the Tribunals' Office sent the following letter to the parties dated January 15, 1997:

> The Chair of the Board of Inquiry has asked me to advise you that Mary Woo Sims has been appointed as the Chief Commissioner of the British Columbia Human Rights Commission. Ms. Sims tendered her resignation to the Chair on January 7, 1997, with her last day being February 24, 1997.
>
> Given that Ms. Sims will be unable to continue to hear the complaint to its conclusion, the Chair intends to re-assign the hearing to another member of the Board of Inquiry panel, pursuant to his authority under section 35(8) of the *Human Rights Code*. The case file, including the motion for the stay of the proceedings and the Respondents' letter of January 14, 1997, has not yet been forwarded to the new panel. This will be done by **January 17, 1997**, unless we are advised by any party by that date that they object to the re-assignment. The hearing day scheduled for January 28, 1997, is cancelled. (emphasis in original)

No party advised the Tribunals' Office that it objected to the re-assignment, and the file was forwarded to me. It included a letter from Respondents' counsel, dated January 13, 1997, addressed to the attention of Mary Woo Sims. It read, in part:

> . . . the Responding Parties have proposed to bring a motion before you to stay these proceedings pending the outcome of the Application for Judicial Review.
>
> I am pleased to advise you that Ms. Pike, counsel for the Ontario Human Rights Commission, and Mr. Wise, counsel for the complainant, have consented to a stay of these proceedings pending the outcome of the Application for Judicial Review. As such, counsel are in your hands with respect to formally issuing an Order staying these proceedings pending the outcome of the Application for Judicial Review.
>
> I would propose that, provided you are so inclined, you simply issue an Interim Decision in accordance with this letter without the necessity of counsel appearing. However, if you wish us to appear, draft an Order, etc., please advise and all counsel would be pleased to do so.

By letter dated January 23, 1997, the Tribunals' Office advised the parties as follows:

> This is to advise you that the request for a stay of proceedings will be dealt with at the hearing scheduled for **Thursday, January 30, 1997.** The parties are expected to attend and make full submissions in support of their positions, and to support such submissions with relevant legal authorities. (emphasis in original)

The parties attended before me on January 30, 1997. Notwithstanding the clear direction contained in the above letter, Respondents' counsel failed to adduce any legal authorities whatsoever in support of his request for a stay. Instead, he merely reiterated the fact of the other parties' consent to the granting of the stay, and indicated that in the absence of a stay there existed the potential, should the judicial review application be successful, that the hearing would be stopped in the middle and have to be restarted with the audio equipment activated. He further advised that the Application for Judicial Review would be perfected within the next couple of days and that it was his understanding that Divisional Court might be able to schedule the matter for hearing in March or April. Respondents' counsel did acknowledge that he had no control over when Divisional Court would actually hear the matter, or when it might render its decision. The extent of the Commission's and the Complainant's submissions was to indicate that each consented to the stay.

I asked all counsel if they had given any thought to how the concern prompting the request for a stay might be alleviated while the hearing proceeded. In particular, I advised that any party could, at its own expense, engage a court reporter to record the hearing. Counsel for the Respondents indicated that such an arrangement would not satisfy his client's interest, because the Board of Inquiry and not his clients has an obligation to pay for a verbatim record, and it would be "cumbersome" for the Board to reimburse his clients for the costs of a court reporter should the judicial review succeed.

No one suggested that I revisit the Sims Decision and consider whether the Application for Judicial Review created new and compelling reasons for me to exercise my discretion to turn on the audio equipment.

Respondents' counsel also advised me that both he and counsel for the Complainant had now booked other matters on days on which all counsel had previously agreed to be scheduled for this matter, and in respect of which notice had gone out. These two parties requested that five hearing days be adjourned: February 5, 6, 11 and 26 and March 5, 1997. Counsel for the Commission remained available for all dates. The submission made in support of the adjournment request was that the Tribunals' Office letter of January 15, 1997 was ambiguous, and the parties read the reference to the cancellation of January 28, 1997 as cancelling **all** scheduled days.

Finally, counsel for the Respondents indicated that he was considering bringing a motion to challenge the validity of the reassignment of the hearing to me, and my jurisdiction to hear and dispose of this matter. Counsel for the Commission expressed a concern that this issue be dealt with as expeditiously as possible.

REASONS

There is no automatic stay of the Board of Inquiry's proceedings when a judicial review application is made. Whether the proceedings are stayed is a discretionary matter for the member hearing the case to decide. A stay is an extraordinary remedy, and in my view the party requesting it must

clearly demonstrate that the balance of convenience overwhelmingly favours the granting of it. Counsel for the Respondents has failed to do that. Even though clearly directed to do so, he made no attempt to support his request with legal authorities.

The balance of convenience in this case favours the continuation of the proceeding. The interest that the Respondents assert in their judicial review application can be protected if they engage a court reporter to transcribe the hearing at their own expense. The fact that it might be "cumbersome" to recover some or all of the cost of doing so from the Board of Inquiry should the judicial review application succeed is not a significant enough factor to outweigh the undesirability of protracting these proceedings any further given the already considerable amount of time that has elapsed between the filing of the complaint with the Commission in the fall of 1991, its referral to the Board of Inquiry in the spring of 1996, and its adjudication in late 1996/97. If a stay is granted now pending the outcome of the judicial review application, it is conceivable that the matter will not proceed before the Board of Inquiry and be disposed of before the fall of 1997 at the earliest. In any litigious proceeding, the length of time that elapses between the actionable events and the adjudication with respect to them is a matter of concern as it may affect the quality of evidence proffered. Delay is of especially great concern in proceedings before administrative tribunals which are supposed to afford parties a means of expeditiously resolving their disputes. Given these concerns, I was frankly surprised that the Commission and the Complainant consented to the stay without any serious thought having been given to alternative means of protecting the Respondents' interest.

Because the granting of a stay is a discretionary matter, I feel it is appropriate for me to take into account in exercising that discretion, the fact that the Respondents did not see fit to ask Ms. Sims to revisit her decision to activate the audio equipment, nor did they ask me to consider the Sims Decision afresh in light of the changed circumstances raised by the judicial review application.

The request for the stay was premised on the potential duplication of proceedings should the judicial review application succeed and the matter have to be re-heard by the Board of Inquiry either in whole or in part. I have considered this factor, and in doing so, I have assessed the likelihood of the Respondents' succeeding on their judicial review application. While the Divisional Court may well have a different view of the matter, I view their chances of success as slim, given the amendment to the *Code* that repealed the Board's obligation to record proceedings before it.

I have taken into account the fact that the Commission and the Complainant consent to the granting of a stay. The fact of their consent does not relieve me of the obligation of ensuring that the balance of convenience favours the stay. I am concerned that granting a stay too lightly, or on the basis of the mere consent of the parties where a judicial review application is pending may create a perverse incentive for the bringing of such applications frivolously, thereby occasioning both delay in the delivery of administrative justice, and the disposition of matters before the courts.

I turn now to the issue of the adjournment. In my view, there was no ambiguity in the January 15, 1997 letter from the Tribunals' Office. The only hearing date it purported to adjourn was that of January 28, 1997. Even if it had been ambiguous, surely it was incumbent on the parties to clarify the status of the previously scheduled hearing dates with the Registrar prior to booking over them, or at the very least, when they received the January 23, 1997 letter advising them of the matters they should be prepared to address at the hearing on January 30, 1997, since this letter made it clear that all dates had not been adjourned. Concomitant with the re-booking of the scheduled hearing dates, I understand that all counsel in this case ceased exchanging various documents and engaging in various other matters that they would normally attend to prior to the commencement of a case on its merits. In my view, it was foolish of them to do so, but I nevertheless agreed that the commencement of the hearing on the merits should be postponed. I therefore ordered that the hearing on the merits will commence on February 11, 1997. I adjourned February 5, 1997 outright. I ordered that February 6, 1997, or some part of it will be devoted to the hearing of any jurisdictional objection arising as a result of the re-assignment of the case to me, and that I would

accede to their request should they request that any such motion be heard by conference call. In the event no such motion is brought, the hearing scheduled for February 6, 1997 will also be adjourned.

Dated at Toronto this 4th day of February, 1997:

Mary Anne McKellar
Member, Board of Inquiry